No. 88-7247

In The

Supreme Court of the United States

October Term, 1990

BRYAN STUART LANKFORD,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Idaho

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

A. The Offense

Bryan Lankford was convicted of two counts of first-degree murder and sentenced to death for his participation in the intentional killings of Robert Bravence, a young Marine Corps officer, and his wife, Cheryl.

The Bravences were camping in the forest near Grangeville, Idaho, in June of 1983. Bryan Lankford and his brother Mark were in the same area, having fled the state of Texas to avoid the possibility that Bryan might be imprisoned for a probation violation. See Trial Tr., Vol. IV, p. 683. The Lankford brothers decided to abandon their automobile and hid it in the woods camouflaged with tree branches. *State v. Lankford*, 747 P.2d 710 (1987). Catching sight of the Bravences, Bryan and his brother decided to steal their Volkswagen van. In a statement made to an FBI agent, Bryan stated that after an hour of discussion he and Mark entered the Bravences' camp. Bryan was carrying a shotgun, which he aimed at Robert Bravence while Mark ordered Bravence to kneel down on the ground. Trial Tr., Vol. III, p. 529, ll.13-15. Bryan gave this description of the murders:

> Mark . . . hit the man over the head with a nightstick like a policeman uses. . . . The woman came up from a nearby creek about that time, and Mark told her to get on the ground. She said something about her husband being hurt on the ground; and, then, she got on the ground. Mark then hit the woman over the head with the same nightstick that he had hit the man on the head with. *Id.*, ll. 15-23.

The Bravences had been beaten to death with such force that their skulls had to be reconstructed by an anthropologist before the cause of death could be scientifically determined. *Lankford, supra.*

Bryan Lankford was not charged with "felony murder" by vicarious liability, as his brief seems to suggest.[1] In each count, Lankford was charged as a principal with "knowingly, willfully, unlawfully, intentionally, feloniously and with malice aforethought" killing the victim named "by beating such person with an unknown foreign object until the said victim . . . died of injuries . . . sustained." JA pp. 10-11. In each count it was also asserted that the murderous acts of the defendant were carried out in the perpetration of a robbery and that death had been inflicted in furtherance of the robbery. *Id.*

Lankford was tried before The Honorable George R. Reinhardt, III, and was represented on appointment at trial by W. W. Longeteig, a highly experienced attorney who had enjoyed considerable success in the defense of criminal cases. Tr., Postconviction Proceedings, June 24, 26, 1985, pp. 111-120.

The jury was instructed respecting the liability of an aider and abettor who participates in a murder committed during the course of a robbery and was told, in addition to what is set forth in the petitioner's brief, that:

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[1] Idaho law defines an aider and abettor as a principal. Idaho Code § 18-204. The Idaho Supreme Court has held that the death penalty may be imposed on an aider and abettor convicted as a principal. *State v. Paradis*, 676 P.2d 31 (Idaho 1983).

> If two or more persons acting together are perpetrating a robbery and one of them, in the course of the robbery and in furtherance of the common purpose to commit the robbery, kills a human being, both the person who committed the killing and the person who aided and abetted him in the robbery are guilty of murder in the first degree. JA p. 17.

The court also instructed the jury that it could not convict unless it found that Bryan Lankford had acted with malice aforethought, R., Vol. II, p. 268; 264, which was defined, R., p. 264, and that *murder* required malice aforethought. R., Tr., Vol. II, p. 261. The provision of Idaho Code § 18-4003(d) that any murder committed in the perpetration of, or attempt to perpetrate a robbery is murder of the first degree, was recited by the court. R., Vol. II, p. 261. The elements of the offense were correctly explained to the jury, and the jury was told that it would have to find the existence of each element beyond a reasonable doubt.

The instructions were consistent with the general principle that malice may be attributed to one who participates in the events leading to the application of deadly force, knowingly, even though he did not have the specific intent to personally apply such force. See, e.g., *State v. Paradis*, 676 P.2d 31 (Idaho 1983); *People v. Ireland*, 450 P.2d 580 (Cal. 1969).

In reviewing the appropriateness of the death penalty, the Idaho Supreme Court found that Bryan had acted with the degree of culpability attributable to a principal in the commission of the offense:

> In this case, Lankford was found guilty of a savage murder against two innocent campers

who were selected because they owned a van which the defendant intended to steal. Lankford came into their camp wielding a shotgun which must have ultimately led to Mr. Bravence's . . . subservient compliance with Lankford's brother's order to kneel on the ground where he was bludgeoned to death. Jurors could reasonably have inferred that Mr. Bravence complied with the demand to kneel on the ground because of the defendant's menacing display of the shotgun. After Mr. Bravence was mortally wounded, Mrs. Bravence returned from the creek. She was ordered onto the ground and unmercifully killed by a blow to the head without a word of protest from Lankford. Although Lankford testified that he did not intend that the Bravences die, Lankford not only participated in the murders, but he did nothing to prevent his brother from bludgeoning Mrs. Bravence after he had witnessed the savage consequences of the nightstick attack on Mr. Bravence. The attack was brutal and one that could only have been intended to kill the victims because of the severity of the blows. The district court judge was entirely justified in finding from the facts that Lankford was a major participant in the killings and that he intended that the Bravences die. JA 237-238.

B. Sentencing Proceedings

On April 5, 1984, shortly after Lankford had been convicted of the Bravence murders, Judge Reinhardt convened a hearing for the purpose of scheduling proceedings for sentencing. JA pp. 20-21. In an order dated May 17, 1984, the court set the hearing for June 28, 1984, and ordered that on or before June 18, 1984, "the State shall notify the Court and the Defendant in writing whether or

not the State will be seeking and recommending that the death penalty be imposed herein." JA p. 23. The court also required the state to identify statutory aggravating circumstances on which it intended to rely in the event it sought the death penalty. *Id*.

The June 18 sentencing hearing was vacated. On July 9, 1984, Lankford was brought before the court to discuss a request for a new attorney. JA pp. 18-19. Lankford stated that he intended to hire another lawyer. *Id*. The court tried to encourage Lankford to work out his differences with his attorney:

> THE COURT: All right. So, at this particular point in time you're satisfied that what we'll do is attempt to let you people communicate more. He said he wants to call you a couple of times a week even if he doesn't have anything to tell you.
>
> MR. LANKFORD: That's fine. That's fine. You know, I'm going to hire another lawyer; and, if they can work together, everything will be just fine. JA pp. 18-19.

Lankford had become increasingly uncooperative about preparing for his sentencing proceeding. Mr. Longeteig testified in postconviction proceedings that he "just couldn't get [Lankford] to respond to anything that bore on sentencing position." Tr., Postconviction Hearing, June 24, 26, 1985, pp. 140-141.

An additional delay was encountered when Lankford, on August 1, 1984, filed a "motion to dismiss counsel and overturn conviction," in which Lankford claimed that he was mentally ill and incompetent prior to trial. Tr., Postconviction Proceedings, p. 5. Lankford was then

transferred to a state institution for a psychological evaluation and, after receiving it in mid-September, the court set a hearing on the issue of representation for September 20, 1984. *Id.*

On September 6, 1984, the court set sentencing for October 12, 1984. JA pp. 24-25. The state was again ordered to notify the court and the defendant whether it intended to seek the death penalty. *Id.* In response to this order, the prosecuting attorney filed notice that he would not be "recommending" the death penalty. JA p. 26.

At the hearing conducted September 20, 1984, the court observed that Lankford's counsel had stated he felt he could continue to fully and fairly represent Lankford, but had expressed concern that Lankford did not trust him. Tr., Postconviction Proceedings, p. 7. Lankford responded:

> THE DEFENDANT: Well, I would like to speak to another lawyer before I make a decision to keep the motion or withdraw it, and I haven't been able to do so up to this point because I feel there are a lot of things that should have been done that weren't done, and the main reason that I have trouble with my counsel is because it's my understanding and it's – this came from a client of Greg FitzMaurice, that my counsel was asked to roll over on this case before my trial ever started, and I didn't – I just can't seem to get to the bottom of this.
>
> MR. LONGETEIG: For the record, Your Honor, I would like to state there is absolutely no truth to that rumor. I can see why that would bother him. Tr., September 20, 1984, p. 7.

At this point, twenty-two days before the scheduled sentencing hearing, the court was concerned that it not fall victim to strategies of intentional delay contrived by the defendant. Although Judge Reinhardt thought it appropriate to appoint co-counsel to work with Mr. Longeteig, he made it clear that the appointment would not automatically be justification for a continuance:

> THE COURT: And in the event you had notions of hiring private counsel, that private attorney very well may tell me that he's not in a position to attend your sentencing hearing on the 12th because of prior obligations or inability to properly prepare because of a prior hearing schedule and, then, that attorney would be requesting a continuance of a sentencing date from me, and if you contacted counsel, for instance, on the 11th of October and made such a request, you should not think that I will automatically grant that request for a continuance.
>
> THE DEFENDANT: I don't think that at all.
>
> THE COURT: Pardon me?
>
> THE DEFENDANT: I don't think that – I'm not taking it for granted that you would do that.
>
> THE COURT: Right. And the reason for that is, as you can very well see, that if I do postpone sentencing until December 1st and you come to me at the end of November and say, "I want to fire him because I can't get along with him." The new lawyer comes to me and says, "I can't get ready for a sentencing tomorrow; I want a postponement," and on and on forever, and it gets to the point where, obviously, you can never be sentenced.
>
> THE DEFENDANT: I want to be sentenced as soon as possible, but I want to be fairly represented.

> THE COURT: I understand that, and that's why I've decided to appoint co-counsel in this case. JA pp. 30-31.

Joan Fisher, who was to be appointed co-counsel, was present and told the court that she was in a position to take on the case. JA p. 32. Shortly thereafter, on October 2, Ms. Fisher moved to continue the sentencing hearing because Gretchen Maurer of San Antonio, Texas, Lankford's mother, was ill and would not be able to attend for approximately four weeks.[2] JA p. 35. Mrs. Maurer's testimony would have been to the effect that Bryan was nonviolent, amenable to rehabilitation, and dominated by his violent brother Mark, and that she did not believe Bryan was involved in the murders. JA pp. 36-37.

Ms. Fisher moved, on October 2, 1984, to dismiss Mr. Longeteig as Lankford's attorney. Tr., Post-trial Motions, p. 14.

On October 5, Ms. Fisher moved to continue a new trial motion and the sentencing proceeding on the conclusory assertion that, after diligent investigation, "defendant's attorney . . . has determined . . . that it is impossible to adequately represent the defendant at the sentencing and motion for new trial without further investigation, preparation, and research of the matters therein." JA p. 38. Lankford also asked for a typewritten transcript of the trial. JA p. 46.

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[2] Lankford had forbidden his previous attorney to contact Maurer. JA p. 72.

The court took up the motions on October 10, 1984. JA p. 51. Judge Reinhardt again warned Lankford that a change of representation would not automatically result in a continuance of the October 12 sentencing hearing. The judge explained that Mr. Longeteig, the prosecutor and the court were all prepared for sentencing and that the court was concerned with possible strategies of intentional delay:

> THE COURT: [B]y putting Ms. Fisher in here at your request at the last moment and, then, dismissing Mr. Longeteig may result in a situation and will result in a situation, I'm sure, that she will be asking for a continuance or a postponement and, again, I will reiterate that I am not in a position to grant a continuance simply because she asks for one. I am also not indicating that the reason you are moving for a continuance is to simply delay sentencing or postpone punishment in this case, but I say that because it is a common occurrence and one the courts are faced with on a regular basis. So, again, I simply reiterate to you that simply because you're complaining about Mr. Longeteig, simply that now you're moving to dismiss him, does not mean that you'll secure or gain, automatically, a continuance of your sentencing today. On the other hand, as I said, the Constitution does dictate or require that I not force you to have counsel if you don't want that counsel, and are you standing, therefore, on your motion to dismiss Mr. Longeteig?
>
> THE DEFENDANT: Yes, I am.
>
> JA p. 53

Mr. Longeteig was dismissed as counsel, but was asked to be available to assist Ms. Fisher. His assistance

was not sought by either Lankford or his new attorney. Tr., Postconviction Proceeding, June 24, 26, 1985, p. 141.

The court denied the motion for a typewritten transcript because preparation of the transcript could not be accomplished prior to the sentencing hearing. JA p. 61. Before denying the motion, the court considered the availability of alternative sources of information and found (1) that Ms. Fisher had, for some time, had access to the preliminary hearing transcript which, according to Mr. Longeteig, in all material particulars contained the same information that was presented at trial, JA pp. 56-58; (2) that Ms. Fisher had reviewed the transcript of the preliminary hearing, JA p. 55; (3) that there was as well an existing transcript of Bryan's trial testimony; and (4) that trial audio tapes were available for Ms. Fisher to compare with the preliminary hearing transcript. JA p. 61.

The court was persuaded a continuance was not necessary to ensure that Lankford had an opportunity to present all relevant mitigating evidence and denied the motion. The court offered to receive the evidence of Gretchen Maurer by affidavit and pointed out that Lankford's offer of evidence would be cumulative. JA pp. 87-88. The court also noted that some of the issues Lankford was raising by way of his new trial motion were suited for postconviction review. JA p. 70.

When Lankford's counsel on the day of sentencing again asked for a continuance, the court responded:

> THE COURT: It's my feeling, and, again, I will reiterate this, that the factors which have resulted in your coming on board at this particular stage were brought about by Mr. Bryan Stuart Lankford in [an] effort to delay these proceedings, and I feel, furthermore, that a continuance will not provide you with any significant or additional information that you may need for sentencing. JA p. 100.

The state called no witnesses at the sentencing hearing. JA pp. 96-97. Lankford, however, called seven witnesses in mitigation, Tr., Sentencing, October 12, 1984, pp. 216, et seq., including his grandmother, an aunt, his sister, three family friends, and a psychiatrist. *Id.* The friends and relatives described Lankford's abusive father and Bryan's domination by his violent brother Mark. These witnesses testified generally that Bryan was not a violent person, was not a threat to society, and would be amenable to rehabilitation. They did not believe him to be capable of murder. Tr., Sentencing, October 12, 1984, pp. 216 et seq. The psychiatrist, Dr. Estess, testified that Bryan had some capacity to relate to other people and that there was a reasonable possibility that, over time, he would develop a healthier approach to life. *Id.* at p. 300. He conceded that Bryan was manipulative and dishonest and that he thought Bryan stayed with Mark because by doing so he was able to avoid feeling personally responsible for his own behavior. Tr., Sentencing, October 12, 1984, pp. 309-310.

C. Notice of the Risk of the Death Penalty

At all relevant times, Idaho Code § 19-2515(c) provided that, upon the finding of one or more statutory aggravating circumstances, the sentencer "shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the

gravity of any aggravating circumstance found and make imposition of death unjust." Two statutory aggravating circumstances were facially evident: (1) "At the time the murder was committed the defendant also committed another murder," and (2) murder committed in the course of a robbery accompanied by specific intent to cause death. Idaho Code § 19-2515(g)(2); (7).

Furthermore, Lankford and his counsel were alerted to the risk of the death sentence on several occasions spanning the case from beginning to end.

When Lankford was taken before a magistrate for an initial appearance, he was told by the magistrate that the penalty for murder was "either a life sentence or the death penalty." JA p. 4. On December 1, 1983, Lankford was arraigned before the district court, at which time the judge explained that "subject to the provisions of 19-2515 Idaho Code: Every person guilty of murder in the First Degree shall be punished by death or by imprisonment for life." JA p. 14. Lankford said he understood. JA pp. 14-15.

Although Lankford's trial attorney, Mr. Longeteig, did not believe Lankford would be sentenced to death, he knew that the death penalty could not be ruled out, as did Lankford himself. JA pp. 73, 78.

Lankford and his counsel had even greater reason to appreciate the risk of the death penalty when the trial judge refused to accept a plea and sentence bargain, to which the prosecuting attorney had agreed, providing that Lankford would not be sentenced to death. JA pp. 79-80; 86.

Lankford himself expressed the view that his life was "on the line" in July, 1984, at the time he was complaining to the court about his trial counsel. JA p. 18.

At the sentencing hearing on October 12, 1984, Ms. Fisher argued vigorously in favor of an indeterminate life sentence, relying heavily on the mitigating evidence presented by Lankford's witnesses. She asserted that Lankford was less culpable than his brother and that he was worth an effort at rehabilitation. She touched also on her understanding of what the judge would consider his sentencing options to be.

> MS. FISHER: . . . I think [the prosecutor's recommendation is] important because I don't know where the court is. You know, I've had an indication from the testimony that the court rejected making an opinion prior to trial on that option. Tr., Sentencing, October 12, 1984, p. 319.

At the conclusion of the sentencing hearing, the trial judge announced that he needed some time to study the case and to prepare his findings before deciding the sentence. He stated that the sentencing options included a life sentence "or death." JA p. 114. At this time, the judge also announced that, because of the aggravated nature of the offense, he would not accept the prosecuting attorney's sentencing recommendation. JA 117-118. Judge Reinhardt left no doubt that he thought the recommendations of both the prosecutor and the defendant's counsel inappropriate:

> In view of the recommendation or suggestion that I run the two sentences concurrently, the recommendation would be, in essence, that the court sentence Bryan Lankford to spend, from this day, less than five years in the penitentiary

> for the murder of each one of the two Bravences, whose names have not yet been spoken today.
>
> * * *
>
> . . . I think that this sentence that has been recommended to me would be contrary to the best interest of society. It would certainly depreciate the seriousness of the crimes that Bryan Lankford has been convicted of, and, in my opinion, seriously undermine the faith that society has in the judicial process. Tr., Sentencing, October 12, 1984, pp. 331, 333.

Lankford's sentencing counsel, Ms. Fisher, made no objection to the court's willingness to consider the death penalty, saying instead that "the only objection I have is that if we can't get sentencing today – I couldn't get a continuance. I mean I made a motion for a continuance. I've got my client prepared to be sentenced today. You know, it seems like the court is playing with him." JA pp. 118-119.

SUMMARY OF ARGUMENT

Idaho law provides that the judge shall pass sentence in capital cases and that the prosecuting attorney's recommendation is not binding on the sentencing authority. The sentencing judge is required to consider the possibility of the death penalty irrespective of what action the prosecutor takes. These features of Idaho law, together with the statutory provision for the death penalty in cases of first degree murder, gave notice to Lankford that he faced the risk of the death penalty.

In addition, Lankford was advised at his arraignment that the death penalty was possible. He was also given this information by his attorney and by the sentencing court prior to the pronouncement of sentence. Lankford's attempt to obtain a plea and sentence bargain which would have insulated him from the death penalty was rejected by the sentencing court prior to trial.

The due process clause does not require giving notice of applicable rules of law or of the standards the sentencing authority may apply in exercising discretionary factors of judgment. By sentencing Lankford to death, even though the prosecuting attorney recommended a lesser sentence, the sentencing judge merely exercised the judgment required of him by Idaho law, and the defendant should be charged with knowledge that the judge would proceed in this fashion.

Lankford's claim that he was denied the Sixth Amendment right to effective assistance of counsel by the trial court's failure to notify him that it intended to consider the death penalty was not properly preserved by presentation to the state courts. The claim must fail on the merits because Lankford had sufficient statutory and factual notice to enable him to prepare for the sentencing hearing. Lankford made a fully adequate presentation of mitigating evidence despite the claimed lack of notice.

ARGUMENT

LANKFORD HAD CONSTITUTIONALLY SUFFICIENT NOTICE OF THE ISSUES HE WOULD BE REQUIRED TO MEET AND THE FACTS PERTINENT TO SUCH ISSUES

A. Notice of the Penalty for Murder Was Provided By State Statute and Actual Notice Was Given

The enactments of a legislative body give legally sufficient notice of their contents without specific action to inform citizens individually of the way they might be affected by the operation of a statute. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). Every person is presumed to know the law. *Traynor v. Turnage*, 485 U.S. 535 (1988). Analysis of Lankford's claim that he was denied due process of law because he did not have notice that the death penalty might be imposed must therefore begin by taking account of what the statutes and judicial decisions allowed in the particular circumstances of his case.

Idaho law provides that the death penalty may be imposed for first-degree murder if one or more statutory aggravating factors are proved. Idaho Code §§ 18-4004; 19-2515. Sentence is imposed by the court without jury participation, and the sentencing judge is required by Idaho Code § 19-2515 to follow a particularized procedure in "all cases in which the death penalty may be imposed." Idaho Code § 19-2515(d). This procedure requires the court to hear all relevant evidence in aggravation and mitigation. "Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing." *Id.* If a statutory aggravating circumstance is found, the court is directed that it *shall* impose the death penalty unless there is sufficient mitigation to outweigh

the gravity of the aggravating factor. Idaho Code § 19-2515(c). The statute does not require the state to give notice that the death penalty will or will not be recommended. Moreover, it is a clear precept of Idaho law that sentencing is the sole responsibility of the judge, and his sentencing judgment may not be controlled by recommendations of the prosecuting attorney. *State v. Pierce*, 593 P.2d 392 (Idaho 1979); *State v. Colyer*, 557 P.2d 626 (Idaho 1976).

Idaho's judicial sentencing statute, Idaho Code § 19-2515, notified Lankford and his lawyer that the sentencer's duty to consider the death sentence would not be triggered by an act of the prosecuting attorney. When a jury is the sentencing authority, the jury must be instructed about the application of aggravating factors. *Maynard v. Cartwright*, 486 U.S. 356 (1988). It is the prosecutor who must seek such instructions and present argument in favor of the death penalty. If the prosecutor does not undertake to pursue the death penalty in a jury sentencing jurisdiction, there is no mechanism by which the death penalty issue can be tendered to the jury. In Idaho, by contrast, the judge is obligated to consider the death penalty irrespective of the wishes of the prosecuting attorney. Judges are presumed to know and to apply the law in making sentencing decisions. *Walton v. Arizona*, 110 S.Ct. 3047 (1989). The accused should not be entitled to close his eyes to these circumstances. The purpose and the nature of this statutory structure make clear that there was no justification for the defendant or his counsel to believe that the death penalty was no longer a part of the case merely because the prosecuting attorney did not recommend the death penalty.

By entrusting the sentencing court with the *obligation* to consider the death penalty in light of the facts, the state has attempted to insure that its statute does not result in the arbitrary imposition of death sentences. The Idaho legislature recognized that a sentence of death must be based on an assessment of factors relevant to the personal culpability of the defendant, *Eddings v. Oklahoma*, 455 U.S. 104 (1982). As a means to facilitate this aim it chose to insist that the sentencer consider all appropriate sentencing options.

The Idaho legislature could appropriately have concluded that to require notification of the prosecutor's intentions regarding the death penalty would draw attention from its chosen focus on the judge as the party solely responsible for sentencing. See *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990).

Nearly a decade ago, in the first case in which the Idaho Supreme Court interpreted Idaho Code § 19-2515, the court held that the statute gave constitutionally sufficient notice of the prospect of the death penalty as a punishment for first-degree murder, as well as notice of the aggravating factors that could apply:

> Not only does the statute so notify, but the record reflects that the court below made the sentencing possibilities abundantly clear to appellant more than once during the proceedings. . . . *Whether the state would urge the maximum penalty or not was immaterial to the question of adequate notice to appellant that it was possible.* . . .
>
> * * *
>
> . . . The statute clearly sets forth that one of the listed aggravating circumstances must be proved beyond a reasonable doubt, and must outweigh any mitigating circumstances shown, prior to imposition of death. Generally, it is apparent that there will be no surprise under the facts of any given case as to what potential aggravating circumstances are involved. Both defense counsel and prosecution who have participated in the earlier preliminary hearing and trial will ordinarily be well appraised and conversant with the facts and issues involved in the aggravation mitigation hearing. . . . *State v. Osborn*, 631 P.2d 187, 195 (1981) (emphasis added).[3]

Thus, petitioner approached his sentencing charged with the knowledge that Idaho law made him eligible for a sentence of death and that the prosecutor's recommendation was not binding on the sentencing authority.

Lankford had even more explicit notice of the death penalty risk than that afforded by Idaho law. He was notified at the arraignment that the death penalty was a part of the case; he was told by his lawyer that the death penalty was possible; his attempt to obtain a plea bargain that would insure him against the death penalty was

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[3] Petitioner suggests that the Idaho Supreme Court referred in *State v. Gibson*, 675 P.2d 33, 42 (1983) to notice that the state intended to seek the death penalty as a procedure "mandated in potential death penalty cases." This is not a fair reading of the court's holding in *Gibson*, where the court said, "We find that all of the procedures mandated in potential death penalty cases were followed," and then went on to list several factors that showed the death penalty was imposed without passion, prejudice or arbitrariness, including the fact that the statutory procedures were followed. Petitioner's interpretation of the case would necessitate a conclusion that *Gibson* is contrary to *Osborn* and Idaho Code § 19-2515.

rejected by the judge; and the court, before passing sentence, expressly advised Lankford and his counsel that the sentencing options included the death penalty, all without objection from the defendant or Ms. Fisher.

Due process calls for such protections as the particular factual situation demands. *Greenholz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979). Lankford was sentenced to death because he was a principal in the murders of Robert and Cheryl Bravence. Although petitioner did not strike the fatal blows with his own hand, he assisted his brother in doing so by subduing the Bravences with a shotgun. Lankford acted with the state of mind of one who killed, attempted to kill, or intended to kill, *Enmund v. Florida*, 458 U.S. 782 (1982), the necessary "intent" being shown by Lankford's own use of lethal force and his own obvious anticipation that his brother would use lethal force. *Tison v. Arizona*, 481 U.S. 137 (1987). Lankford was charged accordingly, and it should have been apparent to him and to his counsel that he would be liable under Idaho law for two convictions of murder in the first degree, potentially punishable by death, depending upon statutory considerations to be applied by the sentencing judge alone. *State v. Paradis*, 676 P.2d 31 (Idaho 1983); Idaho Code §§ 18-204, 18-4001, 18-4002, 18-4003, 19-2515.

Notwithstanding that Idaho Code § 19-2515 *requires* the sentencing court to give consideration to the death penalty whenever a statutory aggravating circumstance appears in the evidence, petitioner asks this Court to alter the Idaho statutory scheme by holding that whenever the prosecuting attorney makes a recommendation for a sentence less than death, an additional burden, not present

in the statute, falls upon the judge to give express notice to the defendant that he might follow the plain mandate of Idaho law. This is not a requirement of the Due Process Clause.

B. The Due Process Clause Does Not Require Giving Notice of Law

The sum of Lankford's argument is that in capital sentencing proceedings notice is particularly important to insure that the death penalty is not arbitrarily imposed, but is, instead, a reasoned response to the defendant's background and character and the nature of the crime. This unexceptionable proposition says little about Lankford's case.

The due process requirement of notice was intended to provide the defendant with knowledge of the issues framed by the state in its charging documents and the facts on which the state will rely to prove its case. Notice of the charges and of the evidence is necessary to permit the person charged to make a fair defense. *Gardner v. Florida*, 430 U.S. 349 (1977).

Notice of facts and of the issues that have been framed is, however, different from notice of rules of law that will be applied by the sentencing authority and notice of the factors of judgment upon which the sentencer may rely.

The notice requirements of the Due Process Clause apply to facts and to governing issues. Notice of *facts* that

may be important to the outcome of the case must necessarily be disclosed if the defendant is to have an opportunity to respond to evidence that may be central to a conviction or a sentence. Thus, in *Gardner, supra,* the sentencing judge violated the Due Process Clause by relying in part on confidential information from a presentence investigation report which was never disclosed to the defendant or to his counsel.

Similarly, *Re Oliver,* 333 U.S. 257 (1948), held that the defendant was denied due process when he was committed for contempt in a secret investigative proceeding on the basis of evidence of which he was not aware.

In *Satterwhite v. Texas,* 486 U.S. 289 (1988), the defendant was sentenced to death on psychiatric evidence obtained in an interview conducted without notice to the defendant's counsel and which involved the development of factual information that would be critical to sentencing determinations.

Lankford, however, was aware of all the facts upon which his conviction and sentence were founded. Indeed, Lankford responded to this evidence and is not in any position to contend that he was denied notice of crucial facts that would bear upon his conviction or sentence. The factual notice cases, therefore, do not establish that Lankford was deprived of due process of law. The court's due process rules cannot be divorced from the reasoning on which they are based. *See, Spaziano v. Florida,* 968 U.S. 447 (1987).

The Court's cases have also found it fundamental to due process of law that a party be informed of the *issues* framed against him. Accordingly, in *Cole v. Arkansas,* 333

U.S. 196 (1948), the Court held that the Due Process Clause requires that a party be informed of the specific charges brought against him and be given a chance to be heard in the trial of issues raised by those charges. In *Cole,* the defendants were charged with a violation of § 2 of a statute penalizing unlawful assembly and were convicted of only a violation of § 2. The state supreme court affirmed the conviction on the ground that § 1 of the act, dealing with the use of force and violence, had been charged and the defendants had been shown to have violated § 1. The state court's decision was disapproved by this Court on due process grounds because the defendants had not been informed that they would be penalized for offenses for which they had not been tried:

> No principle of procedural due process is more clearly established than that notice of the specific charge and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. [Citation omitted.] . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. 333 U.S. at 201.

Obviously, an alteration of the charges at the appellate stage of criminal proceedings deprives the accused of a fair chance to respond. *Cf., Re Gault,* 387 U.S. 1 (1967) (a juvenile defendant was deprived of his right to respond where a juvenile petition was filed on hearing day without having been shown to the boy or his parents and the petition made no reference to the factual basis for judicial action).

The due process right to notice of the charges which had been framed was accorded to Lankford. He was charged by written information with offenses defined by Idaho law. The state's statutes defining and penalizing murder left no doubt of the issues upon which he was to be tried.

In *Dobbert v. Florida*, 432 U.S. 282 (1977), the trial judge, in accordance with Florida statutory procedure, imposed the death penalty even though the jury had recommended a life prison term. Dobbert claimed that a procedural change in Florida law was an *ex post facto* violation and that there was no death penalty in effect when the murder was committed because the statute which was current at that time was later invalidated. The Court held that "the existence of the statute served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the *ex post facto* provision of the United States Constitution." 432 U.S. at 298.

The notice requirement of the Due Process Clause has the same character. Its purpose is to inform the defendant of the legal issues which he must meet and the facts that will be laid against him.

Lankford cites a number of cases addressed to administrative decision-making for the theory that the opportunity to be heard on the issue of the death penalty was denied by Judge Reinhardt's asserted failure to give notice of his intent to consider the death penalty.

It is worth mention that administrative proceedings generally differ from criminal prosecutions in that they

involve official actions, not expressly defined, that leave the trier with a great deal of discretion. *See, Morgan v. United States*, 304 U.S. 1 (1938); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); and *Joint Anti-fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951). Cases which hold that due process is denied by administrative decisions taken in the absence of a definitive complaint, or otherwise without providing a fair opportunity to respond, have little bearing on Lankford's case.

It is more pertinent here that the Court has recognized that the sentencing court may resort to discretionary judgmental factors and may rely on principles of law without giving express notice of its intention to do so.

A sentencing judge does not violate the Due Process Clause by considering even such nonstatutory aggravating circumstances as his own experience with Nazi concentration camps in World War II when discussing the racial motive for a murder. *Barclay v. Florida*, 463 U.S. 939 (1983):

> Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the state entrusts an important judgment to decide in a vacuum, as if he had no experiences. * * *
>
> We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably do precisely that. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. 463 U.S. at 950.

Lack of notice of standards by which evidence will be judged does not violate the Due Process Clause. Although a party is entitled to know the issues on which an administrative decision will turn, the rule does not encompass other kinds of factors affecting judgment. In *Bowman Trans., Inc. v. Arkansas-Best Freight*, 419 U.S. 281 (1974), it was asserted that carriers protesting applications of other carriers had deprived their opponents of notice of what would be considered in rendering judgment by submitting performance studies that postdated the notice of hearing. This Court distinguished between notice of governing facts and notice of such matters as the weight the trier might give to the evidence:

> The district court . . . ruled that since there had been no suggestion during the evidentiary hearings that performance studies subsequent to notice of hearing might not be reviewed as representative, the appellees had been denied fair notice of the standards by which their evidence would be judged. 364 F.Supp. 1239, 1260. We disagree. A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation. [Citation omitted.] But these salutary principles do not preclude a fact-finder from observing strengths and weaknesses in the evidence that no party identified. If the examiners had raised the qualifications to appellees' evidence the Commission later interposed, there would have been no basis for suggesting unfairness. [Citation omitted.] The situation is not altered by the fact that the Commission parted company with the examiners. . . . We perceive no reason for

> binding an agency to the experience and viewpoint of the examiner and the interpretation of studies in the record. 419 U.S. at 288, n.4.

The Court has held that factual findings related to sentencing may be made on review, obviously without specific presentence notice. *Cabana v. Bullock*, 474 U.S. 376 (1986); *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990).

See also, Wainwright v. Goode, 464 U.S. 78 (1983).

Lankford's argument challenges the principles announced in the foregoing cases. In deciding that adherence to the law called for the death penalty, Judge Reinhardt did no more than exercise the judgment required of him by applying known legal standards to known facts. Unless the Court is to authorize the defendant to engage in a kind of practiced ignorance about what the sentencing judge is legally required to do, Lankford is not in a position to claim that he is entitled to relief because he did not have notice that the sentencing court would follow the Idaho sentencing statute.

Lankford's position, were it to prevail, would subject sentencing proceedings to unnecessarily arbitrary forces. Although the judge is required by Idaho law to exercise guided sentencing discretion, Lankford would make the prosecuting attorney's recommendation mean something more in the sentencing process than it should. Thus, if the prosecuting attorney recommends a sentence less than death, the judge must immediately commit to one of two courses of action: either to accept the recommendation or to announce that the death penalty is still possible. The judge would thereby be pressured to start toward or away from the death penalty even before evidence in

aggravation and mitigation has been presented. Idaho has chosen not to place the judge in this position and its choice is entitled to deference. *Walton, supra; Baldwin v. Alabama,* 472 U.S. 372 (1985). See also *Silagy v. Peters, supra.*

C. Lankford's Right to Assistance of Counsel Was Not Abridged By Lack of Notice

The Court held in *Strickland v. Washington,* 466 U.S. 668 (1984), that the right to effective assistance of counsel guards not only against deficiencies attributable to counsel but also against circumstances in which it is appropriate to presume that counsel's ability to represent the defendant has been compromised by government interference.

The Sixth Amendment issue, as framed here, is whether the lack of specific notice that the court intended to consider the death penalty interfered with Lankford's right to effective assistance of counsel, not whether the denial of a continuance had that effect. Presumably, petitioner claims that the lack of additional preparation time contributed in some way to counsel's asserted failure to appreciate that the death penalty might be imposed.

"[T]he right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *United States v. Cronic,* 466 U.S. 648, 658 (1984). A court therefore errs when it infers a violation of the Sixth Amendment from such

potentially nonaffective factors as the time afforded for investigation and preparation, counsel's experience, the complexity of issues, and the accessibility of witnesses. *Id. Cf., Avery v. Alabama,* 308 U.S. 444 (1940) (short time to prepare for trial of capital case did not alone justify conclusion of inadequate representation.)

The Court of Appeals for the Seventh Circuit held in *Silagy v. Peters,* 905 F.2d 986 (7th Cir. 1990), that "certain pretrial knowledge [of the possibility of a death sentence] is not required to protect a defendant's sixth amendment rights." 905 F.2d at 995. The court concluded that the interest of the defendant in developing a trial strategy based on advance notice of the state's intention to seek the death penalty is not protected by the Sixth Amendment.[4] Further, the court observed that the rule sought by the defendant would deprive the Illinois statute of some of its protection against arbitrariness.

Much of what Lankford describes as ineffective assistance attributable to lack of notice is in fact concerned with the court's refusal to continue the sentencing proceeding after Ms. Fisher replaced Mr. Longeteig as counsel. Lankford was personally responsible for this inconvenience because he insisted, without substantial

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[4] A dictum in *Silagy* states that "the sentencing authority's decision to *impose* a sentence of death under the Illinois statute clearly requires notice to the accused." In context, the comment appears to mean only that the defendant must be given such notice as affords an opportunity to respond. For the reasons offered herein, respondent contends that this requirement of due process was satisfied.

reason, on changing attorneys shortly before the sentencing proceeding, after the court and his trial counsel had made preparations to proceed. It is well settled that a party may not complain of error for which he is responsible. *United States v. Young*, 470 U.S. 1 (1985). *See also, Francois v. Wainwright*, 741 F.2d 1275 (11th Cir. 1984).

In any event, Lankford's counsel made a full presentation of mitigating evidence. Lankford's bad upbringing, his brother's violent influence, his own assertedly peaceable nature, the support of his friends and relatives, and his amenability to rehabilitation were all explored at length by favorable witnesses. It has not even been suggested that other mitigating facts could have been produced, or that there exists some variety of evidence that would have been mitigating in a capital proceeding but could have been safely ignored in a non-capital proceeding.

Lankford has not established that lack of notice that the court intended to consider the death penalty had any effect on counsel's performance or on the outcome of the case.

Finally, it must be stressed that the Idaho Supreme Court did not consider any issue related to the effect of lack of notice on the right to effective assistance of counsel. The matter was not raised on direct appeal, see *State v. Lankford*, 747 P.2d 710 (1987), and when Lankford attempted to raise the issue for the first time on this Court's remand, the Idaho Supreme Court held that a procedural forfeiture precluded it from reaching the claim. *State v. Lankford*, 775 P.2d 593 (1989). This issue

should not be considered by this court. *Street v. New York*, 394 U.S. 576 (1969).

CONCLUSION

The judgment of the Idaho Supreme Court should be affirmed. Lankford and his counsel are chargeable with knowledge of the potential for the death penalty upon a conviction for first-degree murder. Lankford is not entitled to close his eyes to the provisions of Idaho law requiring the sentencing judge to pass sentence by exercising his own judgment, not that of the prosecuting attorney.

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